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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19__

BW PARKWAY ASSOCIATES PARTNERSHIP,
PETITIONER,

vs.

THE UNITED STATES,
RESPONDENT.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

C. ELYSE VINITSKY
4801 Hampden Lane
Suite 105
Bethesda, Maryland 20814
(301) 657-2400

Attorney for Petitioner
BW PARKWAY
ASSOCIATES

196 pp

## QUESTIONS PRESENTED FOR REVIEW

I. WHERE THE FEDERAL GOVERNMENT SECRETLY DETERMINED IN 1968 THAT ALL PRIVATE STRUCTURES ON LANDOWNER'S PROPERTY POSED A THREAT TO NATIONAL SECURITY AND THEN THE FEDERAL GOVERNMENT ENGAGED IN A COURSE OF CONDUCT FOR OVER NINETEEN YEARS DELIBERATELY DESIGNED TO ENSURE THAT NO BUILDINGS WERE BUILT, WERE THE GOVERNMENT'S ACTIONS TANTAMOUNT TO REGULATING NO DEVELOPMENT ON BWPA'S PROPERTY UNDER LUCAS V. S.C. COASTAL COUNCIL?

II. WHERE THE GOVERNMENT DETERMINED THAT CONSTRUCTION OF ANY BUILDINGS ON PETITIONER'S PROPERTY POSED A RISK TO NATIONAL SECURITY BECAUSE SPIES COULD LIVE AND WORK IN STRUCTURES IF CONSTRUCTED, WAS THERE A TAKING UNDER THE SUPREME COURT'S RULING IN NOLLAN V. CAL. COASTAL COMM'N AND DOLAN V. CITY OF TIGARD BECAUSE THERE WAS NO LOGICAL NEXUS BETWEEN RESTRICTING THE HEIGHT OF PROPOSED STRUCTURES AND WHETHER SPIES COULD LIVE AND WORK IN SUCH BUILDINGS?

III. WHERE THE FEDERAL GOVERNMENT ENGAGED IN A COURSE OF CONDUCT OVER 19 YEARS DELIBERATELY DESIGNED TO ENSURE THAT LANDOWNER'S REAL PROPERTY REMAINED VACANT AND UNDEVELOPED BECAUSE ANY BUILDINGS ON LANDOWNER BWPA'S PROPERTY POSED A THREAT TO NATIONAL SECURITY, DOES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION MANDATE PAYMENT OF JUST COMPENSATION?

IV. SHOULD THE SUPREME COURT ESTABLISH TWO TESTS FOR TAKINGS - ONE INVOLVING VACANT OR UNDEVELOPED PROPERTY AND ANOTHER FOR PROPERTY WHICH IS DEVELOPED?

V. WHERE THE FEDERAL GOVERNMENT PERMANENTLY TAKES THE FEE OF UNDEVELOPED REAL PROPERTY, AFTER THWARTING ALL DEVELOPMENT ON THE PROPERTY FOR 19 YEARS, TO ADVANCE NATIONAL SECURITY INTERESTS, DO FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V. CTY. OF LOS ANGELES AND THE CONSTITUTION MANDATE THAT THE GOVERNMENT PAY COMPENSATION FOR THE TEMPORARY TAKING?

VI. DID THE COURT OF APPEALS IN AFFIRMING THE COURT OF FEDERAL CLAIMS ERR AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT BOTH LEGITIMATE GOVERNMENT ACTIONS AND GOVERNMENT ACTIONS NOT LEGITIMATE CAN AFFECT A TAKING IF THE ACTIONS DEPRIVE THE LANDOWNER OF SUBSTANTIALLY ALL ECONOMIC USE OF PROPERTY?

VII. DID THE COURT OF APPEALS IN AFFIRMING THE COURT OF FEDERAL CLAIMS ERR AS A MATTER OF LAW BY EXAMINING EACH GOVERNMENT ACTION IN ISOLATION TO DETERMINE WHETHER A SPECIFIC GOVERNMENT ACTION IN AND OF ITSELF PREVENTED BWPA FROM DEVELOPING ITS PROPERTY INSTEAD OF CONSIDERING THE IMPACT OF THE TOTALITY OF THE GOVERNMENT ACTIONS UPON LANDOWNER'S REASONABLE INVESTMENT-BACKED EXPECTATIONS?

## CERTIFICATE OF INTEREST

Counsel for the Petitioner, BW Parkway Associates, certifies the following:

1. The full name of the party represented by me is: BW Parkway Associates, which is a general partnership, successor in interest to BW Parkway Associates Limited Partnership.

2. The partners of BW Parkway Associates are the Melvin J. Berman Revocable Trust, the primary beneficiary who is Melvin J. Berman, BW-32 Partnership, a partnership comprised of the Melvin J. Berman Revocable Trust, Dennis Berman and Gary Berman.

3. There are no parent companies of the party, no subsidiaries (except wholly-owned subsidiaries), nor affiliates that have issued shares to the public represented by me.

4. That all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Elyse Vinitsky is expected to appear in this court. Elyse Vinitsky and Christine M. Sorge of Bethesda, Maryland and Daniel Grove

of Keck, Mahin and Cate, Washington, D.C., appeared for the party below.

12/22/94
Date

Elyse Vinitsky
Elyse Vinitsky

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Petitioner, BW Parkway Associates Partnership ("BWPA"), respectfully prays that a writ of certiorari issue to review the per curiam affirmance by the United States Court of Appeals for the Federal Circuit of the United States Court of Federal Claims judgment finding that BWPA had not met its burden of proof that

the Government's conduct caused BWPA to suffer economic loss.

## OPINIONS BELOW

The opinion of the United States Court of Federal Claims is reported as B.W. Parkway Associates Limited Partnership v. United States, 29 Fed. Cl. 669 (1993), and appears in Appendix A to this Petition. The per curiam affirmance by the United States Court of Appeals for the Federal Circuit appears in Appendix B to this Petition.

## JURISDICTION

The United States Court of Federal Claims Opinion in this matter was filed on October 15, 1993. A timely appeal was filed in the United States Court of Appeals for the Federal Circuit. The Court of Appeals' Opinion was filed on September 15, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV and Amendment V to the United States Constitution are set forth in Appendix C. 10 U.S.C. § 2803; 10 U.S.C. § 2672a; and 42 U.S.C. § 4651 et. seq. are set forth in Appendix D.

## STATEMENT OF THE CASE

The main issue is whether the Government's actions in thwarting all development on BWPA's property to maintain a security buffer for NSA from 1968 through October 1987 constituted a temporary taking of private property for which just compensation is mandated under the Fifth Amendment.

The United States Court of Federal Claims ("CFC") had jurisdiction of this case pursuant to 28 U.S.C. § 1491.[1] The CFC

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[1]The Government filed a Declaration of Taking in the District Court for 255.21 acres of BWPA's property on October 19, 1987. BWPA filed a counterclaim alleging a temporary taking of BWPA's property. On September 21, 1989, the District Court ordered that BWPA's counterclaim be transferred to the Claims Court. The judgment entered in the District Court on July 22, 1991 was for the fair market value of the property taken on October 19, 1987. BWPA did not receive any compensation for the loss caused by the Government's actions prior to October 19, 1987. In fact the Order granting Judgment states:

> Plaintiff and defendant agree that this settlement is in no way res judicata of the case pending in the United States Claims Court...and by entering into the stipulation and accepting judgment, B-W Parkway Associates is neither estopped nor collaterally estopped from making its claims against the United States...Plaintiff [the Government] offered additional monies to Defendant [BWPA] to settle the Claims Court matter, but Plaintiff and Defendant were unable to reach agreement on matters pending in the Claims Court.

United States v. 255.21 Acres of Land, No. WN-87-2810 (D.MD. July 2, 1991).

allocated only four days for the entire trial on the issue of liability with just 2 days for BWPA to submit its extensive evidence of 20 years of Government interference. The CFC held that BWPA had not met its burden of proof that the Government's conduct caused BWPA to suffer economic loss. Id. BWPA timely filed its Notice of Appeal on December 17, 1993 with the United States Court of Appeals for the Federal Circuit which has jurisdiction to review the CFC's judgments for error on questions of law and clear error on findings of fact. 28 U.S.C. § 1295(a)(3). The Court of Appeals affirmed the judgment of the CFC without an opinion on September 15, 1994.

Petitioner, Landowner, is BW Parkway Associates Partnership ("BWPA"). Respondent is the United States Government ("Government"). The agency of the Government most involved was the National Security Agency ("NSA"). The property ("property") was approximately 255 acres of unimproved land in Anne Arundel County, Maryland.[2] The property was

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[2]The total acreage was 258.783 acres. BWPA's claim is based on the Government precluding development on approximately 255+ acres of unimproved land. The CFC Opinion erred in stating: "Throughout the

located at Maryland Route 32 and the Baltimore-Washington Parkway ("BW Parkway") and bordered on the east by NSA and by Fort George G. Meade. In historical documents, the property was referred to as the "Colony Fairfield Tract" or the "Berman Tract." The property was located equidistant from three large population centers, Baltimore, Washington, D.C. and Annapolis.

The vacant land was expressly assembled because it was adjacent to NSA, a very large employer. The principals of BWPA were knowledgeable, experienced, and successful developers. Melvin Berman, a principal of BWPA, was the initiating force behind the development of the planned city of Columbia, Maryland.

Throughout 1968-1987, the property's zoning was: 133 acres of high-rise residential, 53 acres high-density commercial, and 70 acres residential. When BWPA assembled the property

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period at issue, though, the only tenants of the property were a motel, gas station and doughnut shop, and the remainder of the property was vacant." 29 Fed. Cl. at 671. The motel was developed in the early 1960's and was not owned by BWPA. Both the doughnut shop and gas station were constructed before the period at issue and covered approximately 1.3 acres of ground.

there was no published law, regulation or statute that would have prohibited development of the property because of its proximity to NSA or for any other reason. In 1967, when BWPA received confirmation from the General Counsel of NSA that no NSA official had been authorized to tell BWPA that the owners would not be allowed to develop, BWPA fully believed that it was free to develop its property to its full density.

Experts at trial testified that throughout the period 1968-1987, BWPA actively and continuously pursued development in a logical fashion and the development proposed was feasible. Sufficient water and sewer were available for development of BWPA's property. The evidence established that from 1968 through 1987, BWPA spent large sums of money on the following: taxes, insurance, architects, lawyers, engineers and contractors to obtain water and sewer approvals, develop plans, conduct water and sewer studies, soil tests, elevation studies, subdivision submissions, and design building plans for residential areas, office buildings and a shopping center. There was adequate access and road capacity to support BWPA's development. "The record

reflects that real estate development between Baltimore and Washington was 'booming' during the period at issue." 29 Fed. Cl. at 671. BWPA had reasonable investment-backed expectations of developing a town center with high-rise office buildings, high-rise apartments and a shopping center.

Throughout the period from 1968-1987, NSA was continually expanding. By the time this lawsuit came to trial, NSA occupied 5-6 million square feet of buildings adjacent to the property. In the late 1960's unbeknownst to BWPA, the Government secretly determined that a security buffer was required around NSA because if buildings were built on BWPA's property, the interests of national security would be threatened. Beginning in 1967 and throughout subsequent years, NSA conducted many Technical Vulnerability Studies. The ultimate conclusion of all of the Technical Vulnerability Studies was the same: any development of BWPA's property posed a threat to national security and BWPA's property should be acquired in the interest of national security. "NSA officials regarded a large-scale development on the property as a threat to NSA's mission. NSA

collects foreign intelligence for the United States. Its operations are secret, and a foreign government 'would absolutely gain from knowledge of what was going on inside the facility.'" Id. at 671. NSA's internal documents in evidence reveal an internal DoD document which states:

> The justification for the requested acquisition was to ensure against the violation of security of the Headquarters in the years to come, particularly as it is known that the owner of this land is planning intensive apartment and office building construction. The concern of NSA apparently is that having this intense development, probably high-rise, adjacent to the headquarters could permit snooping and other security interference... (balance of sentence redacted)

Letter from Edward J. Sheridan, Deputy Asst. Sec. of Defense to Finn Larsen, Deputy Director DoD (November 12, 1968).

On November 19, 1968, a letter from Marshall Carter, the Director of NSA to the Deputy Director of Defense, first declassified in 1989 and admitted into evidence, said in part:

> NSA has been concerned that the development of this land...would seriously encumber the required security of Agency activities. Recent events have confirmed our concern. The owner of the property has provided us with the master plan for the development of the property, which indicates extensive development including a shopping center and a complex of high-rise apartments. With the

> implementation of such a plan, the security of Agency operations would be seriously exposed to the many types of espionage activities and the modern devices available to glean information concerning Agency activities. The acquisition of this property would provide a security buffer zone and eliminate the ever present threat from our neighbors and their activities.

Another internal NSA document dated May 27, 1969 admitted into evidence discusses what zoning restrictions NSA wanted for the remote portions of BWPA's property:

> within sight of the NSA Headquarters complex, the threat of hostile collection activity is not diminished greatly by distance. Nor does structure height and orientation greatly effect the threat. Instead, it is the covert or noncovert potential of the structure which determines the degree of hazard.

On June 27, 1969 the Deputy Assistant Security of Defense received a classified memorandum from the Chief Operation Support Group discussing the acquisition of BWPA's property:

> If only the southern portion of Parcel 188 is acquired, zoning restrictions will be necessary for the remaining areas to limit the erection of structures to those open to the general public, e.g.,... wherein char and utility personnel have daily access to all internal areas.

On September 11, 1970, the Deputy Assistant Secretary of Defense wrote the Senate Armed Services Committee:

> The owners of this private property have just announced that they intend to construct a high-rise apartment and office building...If this were to develop, modern day electronic and optical devices would permit undesirable parties to snoop into the highly classified activities at the National Security Agency. Therefore, in our opinion, it is imperative that immediate action be taken to ensure that this privately-owned project is not developed. (emphasis added)

The Government's internal documents and witnesses establish that security concerns about construction of any building on BWPA's property were constant from 1968 through 1987. In April 1968, NSA requested DoD to take steps to acquire the property. NSA had DoD approval to acquire BWPA's property in 1968. Repeated authorizations were obtained throughout the years. From and after 1975, the Government also had legislative authority to acquire the property on an emergency basis simply by determining that it was required for national security. 10 U.S.C.A. § 2672(a) and 10 U.S.C.A. § 2803. Throughout the period at issue, the Government had statutory and congressional authority to acquire the property at any time because of NSA's determination in 1968 that the property should be acquired in the

interest of national security.

Under the Uniform Real Property Acquisition Act, once the Government determines it needs to acquire property it is required to proceed expeditiously and not defer negotiations or take any other action coercive in nature. 42 U.S.C.A. § 4651. Rather than acquire the property expeditiously, for 19 years the Government engaged in a course of conduct to ensure that no buildings were built on BWPA's property. The Government influenced the State and County to alter their conduct toward BWPA; and the Government used traffic, road and access issues to thwart BWPA's development. Each time BWPA was successful in obtaining development approvals, the Government would target for acquisition precisely the portion of the property BWPA had planned to develop. The Government had many appraisals of the property done over the years. Repeatedly the Government stalled, delayed, negotiated in bad faith and offered BWPA less than the appraised value set forth in the Government's own appraisals. From 1968 through 1987, the Government used its power and resources to prevent development from occurring on BWPA's

property.

On May 2, 1975, the Secretary of Defense at the behest of the Director of NSA, directed the Secretary of the Army to oppose construction of BWPA's property; the memorandum said in part:

> private developers have submitted a proposal... for extensive development of 252 acres adjacent to the National Security Agency...The Director of the Agency is concerned that this proposed development which includes high-rise buildings, commercial facilities and high-rise apartments may interfere to an unacceptable degree with essential operations of his Agency and represents a major security threat...
>
> The most effective approach, without resorting to a comdemnation [sic] action, would be active participation by the Fort Meade Command with Anne Arundel County planning authorities...This procedure would also be in concert with DoD policy for installation commanders to exercise all available local authority in reaching agreement to forestall unacceptable development. Without such active Post participation, the developers' proposal could significantly infringe upon the operational capability of both the Post and the NSA/CSS.

Despite the overwhelming documentary evidence that established that the Government considered the construction of any buildings on BWPA's 255 acres a threat to national security, the CFC found "NSA officials opposed development on the property

because they believed such development would facilitate surveillance of NSA operations." 29 Fed. Cl. at 673. The CFC admitted that NSA preferred the property to remain vacant, but despite the overwhelming evidence that the government wanted no buildings on the property, the CFC concluded that "[NSA] found that it could maintain security by other methods, such as restricting building heights and location or limiting construction to buildings with public access." Id.

From 1968 to 1987, the Government engaged in a course of conduct designed to maintain its security buffer. The combination of the Government actions interfered with BWPA's reasonable investment-backed expectations, which were to develop its property as a large, mixed-use town center in accordance with its zoning. The proximate result of the Government's actions was that BWPA could not build buildings and was deprived of substantially all economic benefit from its property from 1968 to 1987. The Government's actions forced BWPA to sacrifice all economically beneficial uses of is property for the common good -- national security interests.

## REASONS FOR GRANTING THE WRIT

### I. A WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS DECISION AFFIRMING THE CFC IS IN DIRECT CONFLICT WITH THE FIFTH AMENDMENT AND THE SUPREME COURT'S DECISION IN DOLAN v. CITY OF TIGARD

Recently, this Court in Dolan v. City of Tigard, No. 93-518 (U.S. June 24, 1994), held that a taking had occurred where the city wanted to impose a permanent recreation easement on Dolan's property. Although Dolan is clearly not on all fours with BWPA's case; the fact that this Court found a taking in Dolan mandates the finding of a taking in the case of BWPA. In Dolan, the landowner wanted to double the size of her hardware store to 17,600 square feet from 9,700 square feet and to pave a parking lot. The city required that Dolan dedicate a 15 foot wide strip of land adjacent to the flood plain as a pedestrian/bicycle pathway. Id., slip op. at 4. The dedication encompassed approximately 10% of the landowner's property. The Court found, "Petitioner would lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it

would be eviscerated." Id., slip op. at 19.

Effectively, Dolan holds that if Government action interferes with a landowner's right to exclude others, a taking has occurred for which compensation is warranted.

In the case of BWPA, for over 19 years, from 1968-1987, the Government's internal documents admitted into evidence, trial transcript, and Government admissions establish that the secret agenda was to ensure that BWPA's 255 acres remained in its undeveloped state. The Government's own documents acknowledge that an office park of up to 5 million square feet was feasible. The 130 acres zoned for high rise apartments would have permitted over 2,900 residences.

Each time BWPA got close to being able to develop a portion of the property, the Government would threaten to take that portion of the property. Not until 1990, after three years of discovery battles, did BWPA learn that during all of these 19 years that BWPA was trying to develop its property, secret NSA documents revealed that the Government had no intention of letting BWPA develop any of it. The NSA documents state such things

as "we must ensure that no development occurs." Unlike Dolan, the Federal Government did not try to acquire merely 10% of BWPA's property as a security buffer zone, it engaged in a deliberate course of action for over 19 years to ensure that no buildings were built anywhere on 255+ acres of BWPA's property. The CFC acknowledged that the Government preferred that BWPA's entire 255 acres remain vacant. The CFC also found "It is clear that NSA desired to maintain a buffer zone around its perimeter and preferred to control the development." 29 Fed. Cl. at 677. The CFC recognized only a fraction of the Government's intent when it stated:

> NSA officials regarded a large-scale development on the property as a threat to NSA's mission. NSA collects foreign intelligence for the United States. Its operations are secret, and a foreign government 'would absolutely gain from knowledge of what was going on inside the facility.' Officials feared that the development of certain types of buildings so close to NSA would compromise national security by facilitating surveillance of NSA's operations.

29 Fed. Cl. at 671.

The CFC ignored the Government's secret and internal documents admitted into evidence which establish that NSA

perceived that the real threat to national security was that spies could live and work in any privately controlled structures and could glean information from NSA's top secret activities. Essentially, the Government's covert agenda that no private structures be built on BWPA's property eviscerated BWPA's right to build private buildings.[3]

The result was that BWPA could derive no economic benefit from its undeveloped, vacant property while, at the same time, the nation's national security benefitted from the security buffer created around NSA. BWPA was forced to bear a burden that the public as a whole should have borne. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 319 (1987) (quoting Armstrong v. U.S., 364 U.S. 40, 49 (1960)). The Government's actions in thwarting all development on BWPA's property so the Government could maintain its security buffer were tantamount to a regulation that eviscerated

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[3]Secret NSA letter to Chief dated March 2, 1971 "threat is more serious when there is an uncontrolled structure nearby which could be used for the covert installation of penetration equipment...the commercial development of property, such as the construction of a high rise apartment, would provide other opportunities for an intelligence agent..."

BWPA's right to build private structures on its property and effected a temporary taking of landowner's property for 19 years, which is in direct conflict with the Supreme Court's decision in Dolan.

## II. A WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS DECISION AFFIRMING THE CFC IS IN DIRECT CONFLICT WITH THE FIFTH AMENDMENT AND THE SUPREME COURT'S DECISION IN LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

In Lucas, the Beachfront Management Act resulted in requiring Lucas' property to be left in its undeveloped state. Even though there were subsequent amendments under which Lucas could have applied for a permit for future construction, this Court focused on Lucas' claim for past deprivation. Lucas v. S.C. Coastal Council, 112 S.Ct. 2886, 2889 (1992). This Court stated that Government regulations that deny a property owner all economically viable use of a landowner's property require compensation without the usual case specific inquiry into the public interest advanced in support of the restraint. Id. at 2893. The reasoning is because the practical and economic consequence of

depriving a landowner of economically viable use of his land is the same as if the land had been physically appropriated. The same rule should apply to Government actions. If legitimate Government actions deprive a landowner of all economically viable use of his property, it is the same as if the land has been physically appropriated.

In BWPA's case, the combination of the Government actions to block development were tantamount to regulating that BWPA's property remain in its undeveloped state. BWPA was denied all economically viable use of its land. Effectively, the Government actions in opposing, thwarting and blocking development on BWPA's undeveloped land was analogous to a regulation which denied petitioner all economically beneficial and productive use of petitioner's land. See Id., Agins v. Tiburon, 447 U.S. 255,260 (1980); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987), Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987). And where the Government's actions are like a statute which regulates the uses that can be made of property, said actions or statute "effects a

taking if it 'denies an owner economically viable use of his land...'" Keystone, 480 U.S. at 495 (quoting Agins v. Tiburon, 447 U.S. at 260) (emphasis added). BWPA's economic loss was as a direct consequence of NSA's determination to ensure that no buildings were built in the interest of national security. Each time BWPA tried to develop some portion of the property, the Government tried to acquire the very interest BWPA was trying to develop. It is neither logical nor prudent for a developer to continue to spend huge sums of money on developmental costs and infrastructure when the government has advised the landowner that it will take some interest in the property. See Benenson v. U.S., 548 F.2d 939 (Ct. Cl. 1977). Essentially, BWPA was required to keep his property in its undeveloped state for the public good -- for national security. As the Government's own witness said -- all development posed a risk.[4] Once the Director of NSA had

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[4] Q. Was NSA concerned about buildings being built on the subject property? A. Absolutely. Q. Was there ever a time when NSA was not concerned about buildings being built on the subject property? A. I don't recall at any point that somebody would not be concerned. Q. Did NSA's concern about buildings on the subject property extend to high-rise office buildings? A. Absolutely. Q. What was the concern about high-rise office buildings? A. Well, the utility of the building is immaterial, whether it was an apartment building or office building. The

determined that the acquisition of BWPA's property was in the interest of national security, the Government's threats to take the property were always backed by the Government's ability to take the property based upon both statutory and emergency authority. 10 U.S.C. § 2672a, 10 U.S.C. § 2803.

Where a landowner is thwarted from building any buildings on its property because such development would threaten national security, the landowner has not simply suffered a diminution in value but rather a total elimination of all value and a taking has

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fact that there was a fixed location immediately adjacent to our property was a threat. Q. Did it matter how tall the building was? A. The line of sight is what matters. Q. So if the building could have line of sight of any of NSA' buildings, that's what the concern was? A. Absolutely. Q. Did the same apply to a shopping center? A. I think the operative term is a fixed location. So if it's a structure, a shopping center, a building, you know, in my own mind it would be less of – certainly of a technical security vulnerability threat because it would be a public facility, but it was an uncontrolled facility. Q. So any building that had line of sight of NSA was the type of development that NSA opposed? A. It represented a potential for technical security vulnerability, yes. Q. And the government did, in fact, want the property as a security buffer? A. That's correct. Q. Is it also true that the government didn't want buildings on the subject property? A. That's correct. Q. And the government wanted to take the property so buildings weren't built on the property? A. That's correct.

Czaplicki Deposition, January 25, 1992 at 31, 83, 84, 121, 122 (admitted into evidence).

occurred. This Court in Lucas states: "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." Lucas 112 S.Ct. at 2895. In this case, BWPA's property was kept economically idle for 19 years in the name of national security. The lower courts decisions are in direct conflict with this Court's holding in Lucas and the Fifth Amendment; a writ should issue.

## III. A WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS DECISION AFFIRMING THE CFC IS IN DIRECT CONFLICT WITH THE FIFTH AMENDMENT AND THE SUPREME COURT'S DECISION IN NOLLAN v. CALIFORNIA COASTAL COMMISSION

In Nollan, the California Coastal Commission in approving a rebuilding permit imposed a requirement that the owners provide lateral access across their property to the public. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). This Court

held that without paying compensation, the government cannot simply obtain an easement to serve some valid government purpose.

The CFC, in ignoring the voluminous record of secret Government documents, erroneously suggests that the Government was not in fact trying to prevent all development, that it simply wanted to limit development or restrict the height of development. To buttress its conclusion, the CFC cites the fact that in the early 1970's the Government was attempting to purchase a height easement restricting development 190 feet above sea level. In actual fact, the Government's own documents establish that the bulk of BWPA's property was at an elevation in excess of 190 feet above sea level and to impose such a height restriction was akin to restricting virtually all development when BWPA's zoning would have allowed it to construct buildings in excess of 10 stories. The CFC's finding that "[w]hile NSA preferred the property to remain vacant, it found that it could maintain security by other methods, such as restricting building heights and location or limiting construction to buildings with public access" is a legal basis for

reversing the CFC's decision. 29 Fed Cl. at 673.

In BWPA's case, the Government may have had a valid governmental purpose for wanting to maintain a security buffer around NSA. The Government also may have legitimately felt that construction of buildings on BWPA's property posed a risk to national security. However, the Government does not have a legal right to use its power and influence to block and oppose development, to ensure that the property remain vacant, to restrict and control development, without paying for that right. As this Court stated in Footnote 2 in Nollan, "...the right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a 'governmental benefit.'" Nollan, 107 S.Ct. at 3146 n.2.

BWPA's right to build on its property should not have been subject to height restrictions because of national security nor should BWPA's right to develop its property have been restricted to constructing buildings only open to the public. The Government was not conveying special benefits on BWPA's property. BWPA should have had an absolute right to build in accordance with its

zoning established by local authorities.[5]

Even were it valid for the Government to limit the amount of construction or restrict the height of construction to further the Government's national security interests, this Court requires a logical nexus between the restriction and the security interest being served or the restriction would be invalid under this Court's rulings in Nollan and Dolan. Since the Government's own documents throughout the years establish that the real threat was that potential spies could live or work in private buildings on BWPA's property, restricting the height or location of buildings had no logical nexus to the national security threat. A spy could live in a one story house and still snoop into the highly classified activities at NSA. Czaplicki, supra note 4, at 20-21. Moreover, the Government cannot restrict size, location, height or type of building on one individual's property for the public good without payment of just compensation.

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[5]Had there been a published law in existence when BWPA acquired its property that BWPA's right to develop was restricted because of the property's proximity to NSA, BWPA concedes there would have been no taking. However, the Government has admitted that there never has been such a law or regulation.

In this case, the character of the Government's action and the nature and extent of the Government's interference with the rights of BWPA were far more intrusive than that found in either Nollan or Dolan.

## IV. A WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS DECISION AFFIRMING THE CFC IS IN DIRECT CONFLICT WITH THE FIFTH AMENDMENT AND THE SUPREME COURT'S DECISION IN FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH v. COUNTY OF LOS ANGELES

The Court of Appeals decision in affirming the CFC opinion is in direct conflict with this Court's decision in First English. In First English this Court held: "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." First English, 482 U.S. at 321.

In this case, for over 19 years the Government deliberately engaged in a course of conduct to thwart the development of any

buildings on BWPA's property because the Government had secretly determined that the presence of any private buildings on BWPA's property posed a risk to national security. In 1987 when BWPA was again about to start construction on an office building and public utilities system, the Government finally took the fee and filed a Declaration of Taking in the U.S. District Court. BWPA filed a counterclaim for inverse condemnation for a temporary taking from 1968 through 1987 that was transferred to the Court of Federal Claims. The resulting judgment in the District Court decision only compensated BWPA for the fair market value of the unimproved land in 1987. This permanent taking of the fee did not erase the temporary taking that occurred as a result of the Government's deliberate actions to maintain a security buffer for 19 years.

The CFC's decision was clouded by the fact that BWPA received money for the 1987 value of the undeveloped land. Economic benefits of property directly relate to the period of ownership. Income or economic productivity generated during the period of ownership is based on the uses to which the property can

be put. When someone buys a property, the purchaser is paying the seller for the right of purchaser to obtain the economic benefits of the property in the future. When Government condemned the fee, BWPA received the fair market value for its property in an undeveloped state. The price being paid was based on what an arms length buyer would pay an arms length seller for undeveloped land based upon the future uses to which the property could be put. The sum received by BWPA did not compensate BWPA for the 19 years the land was held in an unproductive state because NSA was engaged in a course of conduct designed to keep BWPA's property undeveloped. In Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), the regulation took the right to mine coal under the surface of the land. NSA's secret determination in 1968 that all structures on BWPA's property posed a risk to national security and its actions in furtherance of that objective effectively took BWPA's right to build above the surface of the land. As stated in Pennsylvania Coal, "the right to coal consists in the right to mine it...What makes the right to mine coal valuable is that it can be exercised with profit." 260 U.S. at 414.

What made BWPA's property valuable was the right to develop it to full density and to be able to build on it and to lease it, to have private office buildings and residences. The fact that the Government ultimately took the fee in 1987 does not extinguish the prior taking from 1968 through 1987 during which time BWPA could derive no economic benefit from its 255+ acres of land.

In this case, BWPA was doubly penalized. The property was undeveloped due to the Government's repeated efforts to make sure that it remain that way. The Government systematically thwarted development of the property each and every time BWPA had development plans. Not only did BWPA lose the economic benefits that it would have derived from commercial development, but additionally the Government was able to buy the unimproved ground instead of the fully developed town center for which the property was zoned. As early as 1968, when the Government was negotiating for additional office space for NSA and BWPA was about to construct office buildings, the Government acknowledged in its secret documents that:

> The security requirements of the Agency are such that we must ensure against any commercial

> development on this tract. Any effort at this time to consider negotiating with the owners of this tract for the construction of a leased facility would tend to further encumber our negotiations to acquire the property, as it would have a tendency to increase the appraised fair market value of the now generally vacant land.

Oct 14, 1968 letter from NSA to GSA.

The fact that the Government subsequently took this property permanently does not relieve the Government from its obligation to pay BWPA for the use of the property as a security buffer for 19 years. As this Court has said, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." First English, 482 U.S. at 2389 (quoting Pennsylvania Coal, 260 U.S. at 416). BWPA agrees that the Government had every right to prevent buildings on BWPA's property to maintain a security buffer around NSA. However, once the Government determined in 1968 that construction of any buildings on BWPA's property posed a threat, the Government should have told BWPA that it would never be able to build any buildings on its property and the Government should have acted

expeditiously to take the property. Instead the Government engaged in a course of conduct, much of it covert, intentionally designed to ensure its goal of preventing all buildings and achieving its goal of a security buffer at a private landowner's expense.

Even Justice Stevens' dissent in First English recognized:

> Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.

First English, 482 U.S. at 330.

The effect of the depth of the Government's actions in this case was that 255+ acres of BWPA's property remained undeveloped because the Government's actions were calculated to ensure that no development would occur on BWPA's property.

As to width, the effect of the Government's actions was to limit, restrict and, in fact, preclude development anywhere on the

255+ acres of property. In the early years, BWPA had tried to build a shopping center which met with Government opposition. Later, BWPA submitted a site plan for apartment buildings. Only after BWPA had obtained most of its county approvals did the Government advise the county that the Government had a congressionally approved project to acquire 75 acres of BWPA's property which just happened to encompass BWPA's first phase of development. The Government's action required BWPA to revise its entire site plan. Once the site plan was revised, the Government tried to impose a height easement. At another time, BWPA proposed to build an office building on another portion of the property and again the Government threatened to take the property. As the Government's internal documents and testimony of its witnesses reveal, there was no place on BWPA's property where buildings could have been constructed without posing a threat to national security. Czaplicki, supra note 4, 20-21.

As far as length, the Government's actions in this case continued for a period of over 19 years. Petitioner concedes that the Government may have had legitimate Government concerns

about national security and may have needed a security buffer. The Government may also have had a right to use BWPA's property as a security buffer for a period of years provided that the Government paid for that right as mandated by the Fifth Amendment. What the Government does not have the right to do, is to use its Federal Powers and influence to use private property as a security buffer in the interest of national security in lieu of exercising its powers of eminent domain to avoid paying the landowner just compensation.

The law established by the Constitution is that private property shall not be taken without just compensation. Once property is taken, even temporarily, no subsequent government action can erase that taking. In First English, the fact that the law was declared unconstitutional and landowner had property it could develop did not eradicate the two year temporary taking when the unconstitutional law was in effect. The facts in this case are even more compelling. Even when the Government ultimately exercised its power of eminent domain and took BWPA's property permanently, payment for the value of the property only

compensated BWPA for the loss of the use of the property from the date of the taking forward. It did not compensate BWPA for the temporary taking during the 19 years when BWPA could not derive any economic benefit from the property because the Government was engaged in a deliberate course of conduct designed to ensure that no buildings were built on the undeveloped property.

This Court in First English states "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" First English, 482 U.S. at 318-319 (quoting Armstrong v. U.S., 364 U.S. 40, 49 (1960)). This Court in First English also found that "It is the owner's loss, not the taker's gain, which is the measure of the property taken." Id. at 319 (quoting U.S. v. Causby, 328 U.S. at 261). "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." Id. at 319. In

BWPA's case, before NSA made its secret determination that construction of any buildings on BWPA's property posed a risk to national security, BWPA had a legal right to build high-rise office buildings and high-rise apartment buildings on its property. For over 19 years, the Government took actions deliberately designed to thwart all development on the 255+ acres. Those actions in maintaining a security buffer effected a 19 year temporary taking under this Court's ruling in First English and under the Fifth Amendment; and a writ should issue.

## V. A WRIT SHOULD ISSUE BECAUSE THIS CASE IS UNIQUE IN THAT PRIVATE PROPERTY WAS TAKEN IN VIOLATION OF THE FIFTH AMENDMENT IN FURTHERANCE OF NATIONAL SECURITY INTERESTS WITHOUT PHYSICALLY INVADING THE PROPERTY AND WITHOUT DIRECTLY REGULATING THE PROPERTY

The Fifth Amendment to the Constitution does not define the means by which property must be taken for the Fifth Amendment to apply.

Although the Fifth Amendment does not define the means used by the government to effect a taking, historically this Court

has focused on two areas – direct physical invasion or appropriation and regulation. This case is unique in that the Government effected a taking of private property for over 19 years not by physical invasion and not by direct regulation. The Fifth Amendment does not say that the only means of taking property is by appropriation or regulation. In this case, the Government took BWPA's right to develop its vacant land by a combination of actions designed expressly to ensure that no buildings were built on BWPA's property. The Government effectively regulated no development of BWPA's land by making a secret determination that any development on BWPA's property posed a security threat because of the proximity of BWPA's property to NSA.

On May 15, 1970, Melvin Laird, Secretary of Defense advised the Directors of Defense Agencies that external influences such as adjacent residential, commercial or industrial development might interfere to an unacceptable degree with essential military operations. That memo authorized NSA to use its considerable influence with local authorities to forestall unacceptable development. The unacceptable development DoD was trying to

prevent was residential, commercial or industrial development on privately owned property which might hinder military operations. Essentially DoD was seeking a "military easement" on all private property adjacent to military bases without having to resort to condemnation. On May 2, 1975, the Secretary of the Army was directed by the Assistant Secretary of Defense to block development on BWPA's property:

> The Director of the Agency is concerned that this proposed development which includes high-rise buildings, commercial facilities and high-rise apartments may interfere to an unacceptable degree with essential operations of his Agency and represents a major security threat...The most effective approach, without resorting to a comdemnation[sic] action, would be active participation by the Fort Meade Command with Anne Arundel County planning authorities...This procedure would also be in concert with DoD policy for installation commanders to exercise all available local authority in reaching agreement to forestall unacceptable development.

Letter from Albert Hall, Assistant Secretary of Defense, to Secretary of the Army, May 2, 1975.

These documents establish that NSA in concert with other Federal Agencies engaged in a course of conduct that was calculated to prevent all development on BWPA's property without

having to resort to exercising its power of eminent domain. As stated in First English:

> It has also been established doctrine at least since Justice Holmes' opinion for the Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' Id., at 415, 43 S.Ct., at 160. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings...'It would be a very curious and unsatisfactory result, if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.'

First English, 482 U.S. at 315-317.

In this case, the Government's absolute need for a security buffer around its top secret NSA building required that the Government take legitimate government action to ensure that BWPA's property remain undeveloped. The Government had the apparent and actual authority to take the property because of the

threat the development posed to national security.

The Government and the CFC suggest that the Government was simply opposing development as a neighboring landowner. The Government was not simply opposing one particular type of development nor was it objecting to a noxious or nuisance use. A neighboring landowner does not have the clout to oppose all forms of development. A neighboring landowner cannot tell an adjacent landowner that if he refuses a below market offer to purchase, that the land will be condemned. A neighboring landowner does not have the power of eminent domain. A neighboring landowner can not secure agreement from the County Planning Authorities to "drag their feet" with respect to approvals; nor can a neighboring landowner require that a site plan be redrawn to accommodate the 75 acres it is going to condemn (but never does). A neighboring landowner cannot summon the enormous power and influence of DoD to prevent development. A neighboring landowner cannot use its proposed expansion as justification to prevent all development on his neighbor's adjoining tract. A neighboring landowner cannot dictate to the State, the future design of the road

network that would eliminate its neighbor's access to the main road. The evidence in this case established that the Government employed all of these tactics to ensure that no buildings were built on BWPA's 255+ acres. NSA's objective was to stop all forms of development for as long as possible so that the Government could delay exercising its power of eminent domain.

The combination of the Government's actions carefully orchestrated at the highest levels of NSA and DoD were intentionally designed to ensure that no development occurred on BWPA's vacant property expressly because NSA wanted a security buffer around NSA and NSA had determined that any buildings on BWPA's property posed a threat to national security. For over 19 years the Government's actions in ensuring that no buildings were built forced BWPA to hold its property in its undeveloped and economically idle state at an enormous economic cost to BWPA. The lower courts failed to acknowledge that a taking under the Constitution can occur without physical invasion and without regulation if the Government through its legitimate actions thwarted development on private property in the interest of national

security. A writ should issue because the Government effected a taking of private property in the interests of national security without directly regulating the property.

## VI. A WRIT SHOULD ISSUE BECAUSE THE FEDERAL GOVERNMENT INTENTIONALLY THWARTED DEVELOPMENT ON VACANT LAND SO THAT THE GOVERNMENT COULD DELAY EXERCISING ITS POWER OF EMINENT DOMAIN AND LATER ACQUIRE THE PROPERTY BASED ON ITS REDUCED VALUE IN ITS UNDEVELOPED STATE IN DEROGATION OF THE FIFTH AMENDMENT

The CFC found that "[w]hile NSA preferred the property to remain vacant, it found that it could maintain security by other methods, such as restricting building heights and location or limiting construction to buildings with public access." 29 Fed. Cl. at 673. This finding on its face is a legal basis for reversing the court's decision and establishes a taking. This finding recognizes that the Government, in furtherance of its security objective, interfered with BWPA's reasonable investment-backed expectations. It is uncontroverted that when BWPA acquired the property there was no published law, regulation or statute

that would have prohibited development of the property because of its proximity to NSA, nor has such a law been enacted. NSA has no authority to restrict design or location of buildings on privately-owned property, nor does NSA have authority to limit construction on privately owned properties to buildings with public access. The Government has no authority to rezone property or to regulate the use of private property absent exercising its authority to condemn. Restrictions on building heights and restricting location and use of buildings are solely the province of the local zoning authorities. Village of Euclid et al. v. Ambler Realty Co., 272 U.S. 365 (1926), Village of Belle Terre et al. v. Boraas, et al., 416 U.S. 1 (1974), Agins v. Tiburon, 447 U.S. 255 (1980). Even zoning authorities do not have the right to require an owner of private property to construct only buildings in which NSA can constantly monitor the inhabitants.[6]

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[6] No legitimate authority authorizes the Government to monitor the activities of its citizens within the confines of privately owned homes without a search warrant. U.S. CONST. amend. IV. "Among a citizen's - including a property owner's - most cherished rights is the right to be let alone." Hendler v. U.S., 952 F. 2d 1364, 1374 (Fed. Cir. 1991).

Yet the Government admitted that if it could not acquire the entire property, it wanted zoning restrictions imposed to limit construction of buildings to those open to the general public. NSA had authority in the interest of national security to condemn air rights or condemn all or a portion of the property provided the Government paid for the interest it was taking. U.S. v. General Motors, 323 U.S. 373 (1945). Instead of directly condemning those portions of the property it needed for its security buffer, the Government successfully impeded all development on the property through a combination of actions, some overt, some covert, some legitimate and some improper, without paying for the restrictions that it needed in the interest of national security.[7] BWPA was unaware of the Government's objectives throughout the years in issue because NSA never told BWPA it did not want any buildings on BWPA's property. The Government documents that establish

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[7]Under Uniform Real Property Acquisition Act, once the Government determined that it needed to acquire the property, the Government was required to do so expeditiously. The statute does not give a landowner a right to sue under the statute; so BWPA could not file suit when the Government repeatedly threatened condemnation over the years. 42 U.S.C. § 4651 et.seq.

the Government's agenda were secret and only later came to light during discovery. BWPA knew that it owned high-density, residentially-zoned land in a location where there was an incredible market for residential housing. The Government never said to BWPA, "You are wasting your time and money, we will never let you build any residential structures. Build something else." The Government never did that because NSA did not want BWPA to build anything; NSA wanted the property vacant. The longer NSA could keep BWPA's property vacant without paying for its security buffer, the less costly it was for NSA because they would not have to pay for any improvements on BWPA's property.

The focus of many Government actions from 1968 to 1987 was to ensure that no privately controlled buildings were built and to ensure that NSA would have complete access to monitor all activities within any buildings. One strand of the bundle of property rights inherent in ownership of residential property is that the owner has the right to exclude others. U.S. v. General Motors, 323 U.S. 373 (1945). The general public does not have a right of access to private residences. Government actions to

limit construction of buildings to those with public access effectively regulated no development on 203 acres of BWPA's property zoned for residential use. By interfering with BWPA's right to develop its residential property, the Government denied BWPA its ability to realize any economic benefit from its undeveloped residentially zoned property from 1968-1987. Serving the public interest by keeping land in a wilderness state should not have been done at BWPA's expense. Althaus v. U.S., 7 Cl. Ct. 688 (1985).

All of BWPA's commercially zoned property was immediately adjacent to NSA's approximately 5 million square foot main complex. Due to the proximity of the commercially zoned property to NSA's main buildings, NSA determined that any buildings with a line of site to NSA's buildings would be a threat to national security, and "any fixed location immediately adjacent to our property was a threat." Czaplicki, supra note 4, at 20-21.

All construction allowed by BWPA's zoning posed a threat to NSA's operations because all privately owned structures, whether they were residential or commercial, could be closed to

the general public. If BWPA could not build any buildings, it could have no economically viable use for its property. Loveladies Harbor, Inc. v. U.S., 21 Cl. Ct. 153 (1990). NSA achieved its covert objective to ensure that no "fixed locations" were built anywhere on the commercially zoned land and that no structures that could be closed to the general public were built anywhere on BWPA's property. The Government's right to restrict or limit BWPA's use of its property in the interest of national security was conditioned upon payment of just compensation for the period during which the Government deprived BWPA of its right to derive economic benefit from its property. U.S. CONST. amend. V.; First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, Cal, 482. U.S. 304 (1987), Lucas v. S.C. Coastal Council, ___U.S.___, 112 S. Ct. 2886 (1992).

The Fifth Amendment of the Constitution provides that private property shall not be taken without payment of just compensation. "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure

*compensation* in the event of otherwise proper interference amounting to a taking. Thus, governmental action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" First English, 482 U.S. at 315.

As long as the Government was successful in opposing all development on BWPA's property so that no buildings interfered with NSA's "security buffer", NSA had no need to use its funds to acquire BWPA's property by eminent domain. See Letters dated May 15, 1970 and May 21, 1975, supra at 19. Were this Court to rule that no taking occurred, it would sanction action by the Government to take all forms of actions to stop development short of actually acquiring property so that the Government never has to pay landowners for property being used for the public good, in violation of the Fifth Amendment.

## VII. THE COURT OF APPEALS IN AFFIRMING THE CFC DECISION ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT BOTH LEGITIMATE GOVERNMENT ACTIONS AND GOVERNMENT ACTIONS NOT LEGITIMATE CAN AFFECT A TAKING IF THE ACTIONS DEPRIVE THE LANDOWNER OF SUBSTANTIALLY ALL ECONOMIC USE OF PROPERTY

The CFC was required to make a factual determination of whether there was a taking based on three factors:

1) the character of the Government's actions,

2) the degree to which the Government actions interfered with reasonable investment-backed expectations, and

3) the economic impact of the Government actions on BWPA.

Connolly v. Pension Benefits Guar. Corp., 475 U.S. 211 (1986).

In cases where that test has been applied, courts have examined all of the Government's actions; actions that were valid as well as those that may have been legally questionable. See generally, Drakes Bay Land Co. v. U.S., 424 F.2d 574 (Ct. Cl. 1970), Benenson v. U.S., 548 F.2d 939 (Ct. Cl. 1977), Althaus v. U.S., 7 Cl. Ct. 688 (1985). Even a regulation that does

substantially advance legitimate state interests can effect a taking. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), Lucas v. S.C. Coastal Council, ___ U.S. ___, 112 S. Ct. 2886 (1992).

Instead of correctly applying the three prong test to determine whether a taking had occurred, the CFC got confused by Agins v. Tiburon, which requires a court to examine whether a proposed regulation advances a legitimate state interest. Agins v. Tiburon, 447 U.S. 255, 260-261 (1980). In applying the first part of the Agins test to this case, the CFC erroneously examined each of the Government's actions to determine whether or not the action was legitimate. See 29 Fed. Cl. at 677. That analysis was irrelevant because even legitimate actions effect a taking if they deny the landowner economically viable use of its land. The CFC considered only those actions that it deemed not to be legitimate in its determination of whether a taking had occurred:

> Some of the government's actions may not fall under the rubric of legitimate actions. Government officials wielded substantial influence over the state highway planning decisions and intended at one point to use highway issues to persuade county officials to reject the development. Government officials also cultivated a relationship with one county zoning official in order to enlist her support against the development. Assuming, *arguendo*, these actions

> impaired BWPA's ability to develop its property, they could support a taking claim. The court will next examine the extent to which these Government actions interfered with BWPA's reasonable investment-backed expectations.

29 Fed. Cl. at 680.

It is clear that the CFC considered only those Government actions involving highway issues and the influencing of county officials to determine whether those two activities impaired BWPA's ability to develop its property. The law requires the court to examine all of the Government actions to determine if together they impaired BWPA's ability to use its property.

The CFC acknowledged that NSA wanted a security buffer around NSA. 29 Fed. Cl. at 673. The CFC considered some of the actions taken by the Government, such as the repeated threats to take the property, the almost continuous "negotiations" to acquire the property, opposing development and the like and labeled them "legitimate." The CFC ignored the impact of these actions on BWPA's ability to develop its property, because they were legitimate government action. The CFC disregarded the fact that legitimate Government actions can effect a taking if the Government action impacts upon the reasonable investment-backed

expectations of the landowner by denying the landowner all economically beneficial or productive use of land. Lucas v. S.C. Coastal Council, 112 S. Ct. at 2894.

Legitimate Government actions that deny an owner economically viable use of his land constitute a taking for which compensation is warranted. First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304 (1987), Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). Even if all of the Government actions are legitimate, a taking occurs if the Government's actions deprive the owner of all economically viable use of its property. Lucas v. S.C. Coastal Council, 112 S. Ct. 2886 (1992). In the present case, the Government's actions deprived BWPA of all economically viable use of its property. Had the CFC examined the evidence in light of whether all of the Government actions, both legitimate and not legitimate, had deprived BWPA of economically beneficial use of its property, a taking would have been found.

## VIII. THE WRIT SHOULD ISSUE BECAUSE THE LOWER COURTS EXAMINED EACH GOVERNMENT ACTION IN ISOLATION TO DETERMINE WHETHER A SPECIFIC GOVERNMENT ACTION IN AND OF ITSELF PREVENTED BWPA FROM DEVELOPING ITS PROPERTY INSTEAD OF CONSIDERING THE IMPACT OF THE TOTALITY OF THE GOVERNMENT ACTIONS UPON LANDOWNER'S REASONABLE INVESTMENT-BACKED EXPECTATIONS

The CFC was required to examine the impact of all of the Government actions as a whole. Instead, the court examined each of the Government's actions separately and concluded that each specific action alone did not prevent BWPA from developing its property. The CFC's faulty analysis is analogous to a murder mystery starring a bungling detective. The detective finds a dead man with a bullet hole in his abdomen, an arrow in his chest and a gash in his head. The detective also finds a letter threatening to kill the man. The detective determines that all of the wounds were inflicted by one person. The medical examiner concludes that none of the wounds in and of themselves could have killed the man. Should the medical examiner conclude the man was not murdered?

In this case, secret documents establish that the Government wanted to ensure that no buildings were built on BWPA's property. The Government wanted to kill all development. The Government influenced county officials, threatened to condemn the property and used traffic issues to impede development. The Government used Army influence to forestall development. The CFC concluded that since none of the individual actions per se prevented BWPA's development, there was no taking. As a matter of law that is wrong. Each action by the Government was calculated to impede development; the combination of the actions killed BWPA's development.

The overwhelming evidence establishes that the totality of the Government's actions in furtherance of its secret objective of maintaining a security buffer interfered with BWPA's reasonable investment-backed expectations of developing its property in accordance with its zoning. Some of the Government's conduct was overt, some of it was covert. NSA with the backing of DoD had an enormous arsenal to carry out its objective to ensure that no buildings were built on BWPA's property. The combination of all

of the Government actions for over 19 years, repeatedly threatening to take property, influencing county officials, impeding development, using traffic issues, as well as other actions - all in furtherance of the Government's goal to keep a one and a half mile radius around NSA free from development - interfered with BWPA's reasonable investment-backed expectations.

In the narrowest sense, the CFC found that no single Government action in and of itself actually prevented all development. That may be the case, but it begs the question. There is nothing in the Constitution or in any of the case law that says that one single act must effect a taking. The CFC suggests that the Government did not delay in taking, despite the fact that nineteen years had passed since the Government first decided to acquire the property. The CFC suggests that if BWPA had been more aggressive in developing, the taking would have occurred sooner. In none of the cases where this Court has found takings has the landowner had to force the taking to establish the fact of taking. See generally, Benenson V. U.S., 548 F.2d 939 (Ct. Cl. 1977).

At another point the CFC suggests that NSA never really believed that the property could be developed so the Government really had no need to take the property. It defies logic that high level NSA and DoD officials spent their time carefully documenting the threat to national security posed by buildings on BWPA's property if development on BWPA's property was deemed not to be feasible. It is also surprising that at trial many experts testified that but for NSA interference, BWPA's property would have been developed.

A writ should issue in this case because the Government intentionally interfered with Petitioner's private property rights for 19 years so that the general public could benefit from enhanced national security. In so doing, the Government deprived BWPA of any economically viable use for his property. The Government is required under the Fifth Amendment to compensate BWPA for the loss of the use of the property for the period of interference whether that interference was by regulation, a single action or a combination of actions.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Federal Claims and the Court of Appeals in this matter.

DATED: December 23, 1994

Respectfully submitted,

C. Elyse Vinitsky

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 19__

No. _____

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BW PARKWAY ASSOCIATES PARTNERSHIP,
PETITIONER,
vs.
THE UNITED STATES,
RESPONDENT.

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PROOF OF SERVICE

I, C. ELYSE VINITSKY, do swear or declare that on this date, December 22, 1994, pursuant to Supreme Court Rules 29.3 and 29.4, I have served three (3) copies of the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid:

The names and addresses of those served are as follows:

Solicitor General, Department of Justice, Washington, D.C. 20530

C. Elyse Vinitsky

C. Elyse Vinitsky

# APPENDIX A

**B.W. PARKWAY ASSOCIATES LIMITED PARTNERSHIP, Plaintiff,**

**v.**

**The UNITED STATES, Defendant.**

**No. 539-89L.**

United States Court of Federal Claims.

October 15, 1993.

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C. Elyse Vinitsky, Bethesda, MD, and Daniel G. Grove, Washington, DC, for plaintiff. Christine M. Sorge, of counsel. Alan Brenner, U.S. Dept. of Justice, Land and Natural Resources Div., and Greg Mack, Nat. Sec. Agency, for defendant.

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**OPINION**

MARGOLIS, Judge.

This takings case is before the court for final judgment after a four-day trial. The plaintiff, B.W. Parkway Associates ("BWPA"), is a partnership that owned property adjoining the National Security Agency ("NSA"), a United States Depart-

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ment of Defense installation. The plaintiff alleges that the defendant, the United States, acting through NSA effected a Fifth Amendment taking by preventing BWPA from developing its property. The defendant argues that the plaintiff failed to develop the property either because of its own failures or because of obstacles to development. After reviewing the entire record, this court holds that the plaintiff has not met its burden of proof. Accordingly, the court directs entry of judgment for the defendant.

## FACTS

### *I. Background*

During the early 1960s, Melvin J. Berman ("Berman"), a real estate developer, purchased several tracts of contiguous land located at the intersection of two highways, Maryland Route 32 (also known as Savage Road) and the Baltimore-Washington Parkway ("BW Parkway"). These tracts, which totalled almost 260 acres, came to be known collectively as "the Berman tract" or

"Colony Fairfield." [1] The Berman tract was bordered on the west by the BW Parkway, on the south by Route 32, on the east by Fort George G. Meade, a Department of Defense facility, and on the north by privately owned vacant land. The attached map from plaintiff's trial exhibit (P's ex.) 89 shows the property's location and road network. Together with his partner, Jack Pollin, Berman formed BW Parkway Associates, a limited partnership, to develop the property. BWPA planned a mixed-use development, including commercial office buildings, retail establishments, high-rise apartments and single family homes.[2] Throughout the period at issue, though, the only tenants of the property were a motel, gas station and doughnut shop, and the remainder of the property was vacant.

The land is located in Anne Arundel County, Maryland. The Anne Arundel County government zoned it for a combination

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[1]The court will generally refer to the subject property as "the property."

[2]During the period at issue, Berman bought out his partners in the Pollin family; thus, the court will refer principally to the activities of Berman and his son, Dennis Berman.

of commercial and residential uses. Approximately 203 acres were zoned for residential uses. Up to 53 acres were zoned for high-density commercial uses. BWPA's development plans called for approximately 3000 residential units, 750,000-1,000,000 square feet of office space, 150,000-200,000 square feet of other commercial uses and a 250-500 room hotel.

Dennis Berman testified that BWPA regarded the location of the property as extremely important. The property lay between three population centers: Baltimore, Maryland; Washington, D.C.; and Annapolis, Maryland, roughly equidistant from Baltimore and Washington. Moreover, two major highways, Route 32 and the Baltimore Washington Parkway, intersected at the property, and two other major highways U.S. Route 29 and Interstate 95, ran nearby. The record reflects that real estate development between Baltimore and Washington was "booming" during the period at issue.

Berman was particularly interested in the property because of its proximity to a large federal agency. The National Security Agency, a U.S. Department of Defense facility and tenant of Fort

George G. Meade, adjoined the property to the east. NSA employed tens of thousands of persons from 1967-1987. According to Dennis Berman, having NSA next door was like "having a city next door. And this city needs services. All those people need a place to live, ... a place to shop." Trial Transcript (Tr.) at 43. BWPA considered the tract "the number one property in the [Baltimore-Washington] corridor." *Id.*

NSA officials regarded a large-scale development on the property as a threat to NSA's mission. NSA collects foreign intelligence for the United States. Its operations are secret, and a foreign government "would absolutely gain from knowledge of what was going on inside the facility." Tr. at 699. Officials feared that the development of certain types of buildings so close

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to the NSA would compromise national security by facilitating surveillance of NSA's operations.

BWPA never developed the property. In 1987, NSA condemned the property and paid BWPA more than $21 million. That award did not compensate BWPA for the value that

development could have brought prior to the taking. BWPA alleges that, from 1968 to 1987, the NSA actively prevented it from developing the property in order to maintain a security buffer zone. According to BWPA, NSA benefitted from keeping the property underdeveloped without compensating BWPA. NSA does not dispute that it opposed the development, but contends that it did nothing improper. NSA argues that typical obstacles to development, such as inadequate highway access and infrastructure, impeded BWPA's plans for the property.

The issue before this court is whether the government's conduct during the period 1968-1987 constituted a taking of property without compensation. The parties dispute several factual issues: the extent to which BWPA tried to develop the property; the feasibility of installing water and sewer systems on the property; and the nature of the government's opposition to development of the property. The court finds the following facts.

*II. BWPA's Efforts to Develop the Property*

BWPA attempted to develop the property from 1967 to 1987. Developing unimproved land is a long, complex process.

Several county agencies must approve aspects of a project, including water and sewer access, storm drains, roads, wetlands, flood plains, and zoning, before construction can begin. All such approvals must be current simultaneously for a developer to start work legally. It can take a developer several years to obtain approvals for a large-scale project.

BWPA planned the development and attempted to ascertain the feasibility of water and sewer systems over a period of years. Starting in 1967, BWPA hired engineering consulting firms to consider methods of providing water and sewer service, improving highway access to the property, and preparing subdivision plats. These efforts continued in the 1970s. BWPA also began acquiring approvals from various local government offices.[3] BWPA won

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[3]Until 1985, Anne Arundel County had a three-stage process for reviewing planned developments. The first stage, called the sketch plan, required the developer to propose a "fairly detailed concept plan," showing a plan for using the land, including the location of buildings and infrastructure. Tr. at 627. At the sketch plan stage, several county offices reviewed the plan to determine if it "had a possibility of being approved, what county or state activities had the possibility of impacting on the development of the site, and what the developer was going to have to address in the additional planning review processes." Tr. at 627-28. The second stage, called the preliminary plan, required engineering work, a traffic impact study, and other studies. The developer had to prepare a final plan within one year after approval of the preliminary plan.

sketch plan approval in December 1971, but did not prepare a preliminary plan. Thus, the sketch plan approval lapsed. From 1972 through 1974, BWPA worked with county officials to gain approval to install an interim sewage treatment plant on the property. The county granted approval in October 1974. Thereafter, BWPA sought estimates for site development to build an apartment building, an office building, and a water supply and waste disposal system. In 1975, BWPA hired an architect to design the buildings. From 1968 to 1975, BWPA officials negotiated with government officials to sell various interests in the property or exchange it for government-owned land.

In 1979, BWPA negotiated with at least one developer to form a joint venture to begin construction. By early 1979, BWPA again submitted a sketch plan proposal, and in August 1980, BWPA again gained sketch plan approval. BWPA officials actively monitored the state highway planning process and provided input.

BWPA came closest to beginning construction when it applied for and, in May of 1986, received a building permit from

Anne Arundel County. In 1986, BWPA planned

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to join the Russett Joint Venture to build water and sewage facilities, and its participation in the joint venture remained a possibility until the government took the property in 1987. Thus, the record shows that BWPA made repeated efforts to overcome obstacles to developing its property, particularly during 1967-1975 and 1979-1987.

*III. Feasibility of Water and Sewer Access*

The court finds that water and sewer access to the property were feasible during the period at issue. In 1967, a consulting firm concluded that BWPA could build permanent or temporary water and sewer systems on the property. BWPA won county approval to build water and sewage treatment facilities in 1974. By 1986, BWPA had concluded an agreement with other developers to form the Russett Venture to build common water and sewer systems. Nevertheless, consultants' reports and expert testimony establish that it would have taken BWPA several years to complete lines to serve the entire development.

Government officials genuinely doubted that BWPA could solve its water and sewer access problems. As early as February 1971, NSA officials stated that "the owner of the property will obviously have difficulty in the development of his land since water and sewage are a problem (he cannot get across Government property without permission) and the fact that he has only one access/egress to public roads." P's ex. 82. Government officials continued to believe that these obstacles prevented development as late as April 1986.

*IV. The Government's Actions*

*A. Early NSA Efforts to Purchase Interests in the Property*

NSA officials opposed development on the property because they believed such development would facilitate surveillance of NSA operations. NSA performed several technical vulnerability studies of the property to assess the threat posed by development of the property. NSA officials concluded that the best way to protect NSA security would be to maintain a security buffer zone around the perimeter of NSA property. While NSA preferred the property to remain vacant, it found that it could

maintain security by other methods, such as restricting building heights and location or limiting construction to buildings with public access.

Starting in April 1968, NSA attempted to acquire the property by exchanging government-owned real estate with BWPA. The General Services Administration ("GSA") represented NSA in negotiations with BWPA. GSA appraised the value of the property at $5,000,000. BWPA disagreed with the government's appraisal. By October 1969, GSA concluded that BWPA's estimate of the value of its property was "inflated," therefore "further efforts to effect an exchange [were] hopeless." P's ex. 49. Government representatives again approached BWPA about an exchange of property in June 1971, but Jack Pollin declined on behalf of BWPA.

NSA tried to acquire limited interests in the property. In 1970 NSA tried to purchase 75 acres of the property and an aerial easement on the rest. These efforts continued into 1971, but NSA was unable to obtain full funding for the purchase.

At the same time, NSA officials voiced opposition to the

development to county officials. In August 1970, Marion McCoy, the County Planning and Zoning Officer, gave NSA information about BWPA's progress in obtaining county approvals for development. She explained that county "[z]oning people have been 'dragging their feet' because they hope that NSA will buy the land in question." She promised to "'drag her feet ' if [NSA were] interested in the land." P's ex. 62. During this period, NSA attended county planning meetings and kept abreast of development efforts. NSA's Chief of Installations and Logistics mentioned that "I don't think we should let an opportunity slip by to officially advise Anne Arundel of our concern for the construction of Colony Fairfield Apartment Complex adjacent to NSA." P's ex. 118. There is some evidence that McCoy opposed the development.

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NSA sought an aerial easement in April 1972 to cover 136 acres of the property. In November 1972, the Army Corps of Engineers ("COE"), representing NSA, opened negotiations with BWPA. NSA and COE believed that unresolved conditions rendered the prospects for developing the property uncertain,

including changes in zoning, proposed highway improvements, and continuing problems with access to the property. Negotiations continued into January 1974. Each side appraised the value of the property very differently, and valuation was complicated by proposed zoning changes. NSA and COE officials ultimately concluded that it would be too costly to acquire the property either by negotiation or by purchase.

After the failure of negotiations, NSA shifted its strategy. The government continued to believe that it would be difficult for BWPA to develop its property. NSA officials agreed to terminate negotiations with BWPA, but to "be alerted to any proposed development by the owners and ...take necessary action to impede any development not harmonious to the area." P's ex. 200. Officials instructed that "[a]ny structure that may create a nuisance or hazardous situation should be opposed by the Government in its capacity as a property owner." *Id.* Additionally, NSA officials planned to contact McCoy concerning "the Government's position and possible courses of action, if development of property creates adverse conditions." *Id.*

There is evidence that NSA planned to impede the development on the property by cultivating a relationship with at least one Anne Arundel County official and by using traffic concerns as a basis for its opposition. At a subsequent meeting, government officials recommended that "Fort Meade pursue a position that additional vehicular traffic resulting from occupants of developed enterprises on the [property] would add to a problem which now exists on the Fort Meade/NSA/CSS's traffic capability." P's ex. 202. NSA planned to discuss NSA's concerns with McCoy for future development primarily because of an influx of traffic, to invite McCoy to NSA "as a prestige factor to express the appreciation of the Agency for her assistance," and to request the Secretary of Defense to instruct the Secretary of the Army to oppose construction of the property adjacent to NSA/Fort Meade. *Id.*

At least initially, NSA followed these plans. COE official Barry Frankel met with McCoy on April 2, 1975, and discussed the Agency's position concerning development on the property. NSA officials planned to actively oppose BWPA's development at

county public zoning hearings.

*B. NSA's Involvement in Traffic Issues*

The court finds that NSA became deeply involved with state officials in traffic planning issues. Starting in 1979, NSA officials attended public meetings and advised state highway planners on the Patuxent Freeway project.[4] NSA officials actively monitored the Maryland State Highway Administrations's ("SHA") progress in developing alternative routes for the Patuxent Freeway, and in 1981 pressed for meetings with Maryland officials in order to affect the decisions. Commencing in the fall of 1981, NSA and Fort Meade officials worked very closely with SHA, holding frequent meetings to work out route alternatives. State officials attempted to satisfy NSA and Fort Meade desires with respect to the highway. In October 1982, an MDOT official stated that "coordination will continue after the [public] hearing to assure that

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[4]The Maryland Department of Transportation ("MDOT") planned the Patuxent Freeway to traverse the county east to west and approach the NSA complex. In June 1979, MDOT began to study proposals for locating the freeway and sponsored public meetings to gather information. The exact location of the highway was the subject of much debate and controversy.

Fort Meade's concerns are adequately resolved in order that we may develop a formal agreement between the State Highway Administration and the Department of the Army." P's ex. 308.

One reason for the close cooperation between federal and state planners was that the state needed an easement through federally-owned land in order to build the new

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freeway. There were other reasons for NSA's interest in the Patuxent Freeway. First, NSA was concerned about traffic congestion along Route 32. Contributing to the congestion were the large number of NSA employees entering and exiting the complex and the location of a major interchange between Route 32 and the BW Parkway. NSA officials worried that development of BWPA's property would worsen congestion by generating tens of thousands of vehicles per day. Second, NSA expressed concern that a major highway passing close to its complex could pose security risks.

In addition to the Patuxent Freeway project, highway planners perceived a need to improve the interchange between

Route 32 and the BW Parkway. NSA was deeply involved in planning the interchange improvements. NSA and Fort Meade officials pressed state highway planners for traffic solutions that suited NSA, but which BWPA opposed. Specifically, NSA favored closing the intersection between the service road and Route 32. NSA favored building a road through the north end of BWPA's property to connect with Maryland Route 175 to provide access to BWPA's property. BWPA officials opposed this idea and wrote to congressmen to express concern that its access to Route 32 would be cut off. In an effort to relieve traffic congestion on Route 32, NSA suggested building an interchange from the BW Parkway directly into the NSA complex. This ramp, called the "connector road," bisected BWPA's property. NSA assumed overall responsibility for the connector road construction. Clearly, the connector road would have required BWPA to alter its development plans. BWPA argued that the exit ramp could serve both it and NSA, but NSA opposed this solution.

NSA exercised significant influence over highway planning decisions. The importance of NSA input is captured by a 1983

letter from the Governor of Maryland to BWPA explaining that he considered NSA's access to Route 32 a priority.[5]

*C. The Taking*

In November 1985, BWPA notified NSA that it planned to begin construction on the property. NSA immediately applied for funding approvals to purchase the property. In a letter dated December 16, 1985, an NSA official informed BWPA that "the Government clearly will acquire that tract" and that "approval is expected to be forthcoming in the next 12 months." P's ex. 486. On December 2, 1985, NSA requested emergency funding for the acquisition.

NSA and COE had to secure several approvals to acquire the property. They had to obtain approval from the Assistant Secretary of Defense and congressional authorization to reprogram funds for the purchase, prepare a planning report and have it

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[5]As Governor Hughes explained, "it is simply not possible to provide even minimally acceptable access to Maryland Route 32 from both the massive National Security Agency complex and your development in the space of just a few hundred feet, with both access points being immediately adjacent to the Baltimore-Washington Parkway interchange." P's ex. 330.

approved, and order an independent appraisal and have it approved. COE was not permitted to negotiate until funds were authorized to acquire the property. For the next year, NSA and COE continuously worked through channels to acquire funding. An independent appraisal valued the property between $9.4 million and $9.7 million. The Assistant Secretary of Defense notified NSA on July 10, 1986 that the funding request met the criteria for emergency funding, and later the Secretary of Defense approved $9.7 million for the emergency acquisition. After following additional procedures necessary to receive funding approval, on September 30, 1986, the Deputy Secretary of Defense notified congressional committees of the proposed acquisition. The documents reflect that government officials acted as quickly as they could to gain funding approvals, but that the approval process was cumbersome.

On May 20, 1986, BWPA received its building permit and pursued plans to join the Russett Joint Venture to build water and sewer facilities. An NSA official asked BWPA to delay construction until

June 15, 1986 to allow NSA time to acquire authorization for funding. On June 19, 1986, NSA reaffirmed its commitment to take the property. In October 1986, NSA sent a letter to BWPA's lawyer explaining the process and reaffirming interest in the purchase. Finally, in November 1986, congressional committees notified NSA that they did not object to the funding, and $9.7 million was approved for the acquisition.

NSA officials opened negotiations with BWPA sometime in late November/early December 1986. Negotiations halted when government officials, who thought the appraisal might be too high, ordered an additional appraisal. Berman became frustrated and wrote to the NSA Director asking for a commitment to purchase the property. Berman also wrote to various congressmen expressing his concern at the lack of progress. The government's reply assured him that the government was taking the property.

Negotiations restarted in July 1987. Negotiations reached and impasse by July 28, 1987, and in October 1987 the government instituted eminent domain proceedings.

## DISCUSSION

### *I. Statute of Limitations*

Defendant raises a statute of limitations defense. The statute of limitations is six years. 28 U.S.C. § 2501. The limitations period first accrues or begins to run when a potential plaintiff knows or reasonably should know of all the events which fix the government's alleged liability. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir. 1988). If an injury is clear but its source unknown, the six-year period starts when the plaintiff has reason to know the cause of the injury. *L.E. Cooke Corp. v United States*, 27 Fed.Cl. 753, 754 (1993); *M.R.K. Corp. v. United States*, 15 Cl.Ct. 538, 544-45 (1988).

This lawsuit is well within the statute of limitations. BWPA claims that the totality of the government's conduct amounted to a taking of the property. The only evidence of a taking about which BWPA could have known before December 16, 1985 were the government's alleged threats to condemn the property. The evidence supporting BWPA's theory in this case consisted of internal government documents to which BWPA had

no access until it conducted discovery. A mere threat to condemn cannot form the basis of a Fifth Amendment taking. *Mesa Ranch Partnership v. United States*, 2 Cl.Ct. 700, 707 (1983). Therefore, a mere threat to condemn cannot constitute all the events which fix the government's liability.

The court finds that the earliest time at which BWPA might have been aware of its claim was December 16, 1985, the date of the letter from NSA to BWPA stating unequivocally that "the Government clearly will acquire that tract." P's ex. 486. That letter, coupled with BWPA's nearly twenty-year history of frustrated efforts to develop the property, could have raised awareness that the government might have taken action to prevent the development. Thus, the time at which the limitations period ended was in December 1991, two years after BWPA filed its complaint with this court.

*II. Nature of Plaintiff's Cause of Action*

*A. Tort*

The defendant argues that BWPA's claims allege tortious conduct, not a taking. Courts consider three factors to determine

whether alleged government conduct constitutes a taking or a tort. First, the government's conduct is more likely to sound in tort if it is unauthorized or unlawful. Lawful or authorized government conduct may be a taking. *See B & F Trawlers, Inc. v. United States*, 27 Fed.Cl. 299, 303-04 (1992); *Clark v. United States*, 8 Cl.Ct. 649, 651 (1985). Second, the government's conduct is more likely to constitute a taking if its consequences are natural, probable or foreseeable. *Clark*, 8 Cl.Ct. at 651; *Berenholz v. United States*, 1 Cl.Ct. 620, 627-28 (1982), *aff'd*, 723 F.2d 68 (Fed.Cir. 1983). Finally, courts consider the nature of the plaintiff's injuries. If a plaintiff claims incidental injuries, the cause of ac-

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tion is more likely to sound in tort. In contrast, if a plaintiff alleges permanent or continuing injuries, the cause of action is more likely to be a taking claim. *Clark*, 8 Cl.Ct. at 651; *Berenholz*, 1 Cl.Ct. at 627.

The court finds BWPA's allegations support a taking claim for several reasons. First, BWPA does not suggest that the

government acted illegally. Rather, BWPA contends that the government acted pursuant to lawful military policy. Though BWPA implies that the government violated statutes requiring expeditious acquisition of property, that is only tangential to this case. Second, BWPA alleges that the government acted intentionally and, in fact, the natural and foreseeable consequence of the government's conduct was to obstruct development of the property. Finally, BWPA alleges an injury of a continuing nature: it claims that the government prevented it from developing the property for almost twenty years.

*B. Taking*

The Fifth Amendment guarantees that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. The guiding principle underlying takings jurisprudence is that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). A takings inquiry requires the court to balance the private and public interests. A government

action effects a taking if it "does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260-61, 100 S.Ct. 2138, 2141-42, 65 L.Ed.2d 106 (1980).[6] Under a takings analysis, the court must consider three factors: (1) the character of the governmental action; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986) (citations omitted). Each factor is examined *seriatim*.

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[6]The facts of this case do not raise a *per se* takings analysis because BWPA does not allege either a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), or a confiscatory regulatory action, *Lucas v. South Carolina Coastal Council*, __U.S.__,__, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1922). Under the *Lucas* framework, a "landowner whose deprivation is one step short of complete ... might not be able to claim the benefit of [a *per se* taking category], but ... '[t]he economic impact of the regulation on the claimant and ...the extent to which the regulation has interfered with distinct investment-backed expectations'" are still relevant to determining whether there has been a taking. *Lucas* __U.S. at__n. 8, 112 S.Ct. at 2895 n. 8 (citation omitted). BWPA has not established that it lost all economically beneficial use of the property.

*The Character of the Government's Conduct*

The court draws inferences as to the character of the government's actions from the basic facts of the case. It is clear that NSA desired to maintain a buffer zone around its perimeter and preferred to control the development. The evidence that the government's actions actually prevented development, however, is conflicting. The court evaluates each of BWPA's allegations.

BWPA alleges that the government negotiated in bad faith. BWPA bases this charge on three claims. First, BWPA asserts that the government tried to acquire only those portions of the property that BWPA focused on for development and stopped its efforts to acquire the property as soon as BWPA stopped trying to develop it. Second, BWPA maintains that the government offered less than it knew the property was worth. Finally, BWPA argues that the government failed to act expeditiously to acquire the property.

The evidence does not support these claims, and the court concludes that the government did not negotiate in bad faith. There is insufficient evidence that the government targeted for

purchase those por-

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tions of the property that BWPA readied for development. Rather, the government targeted for purchase those interests that impacted heavily on its security concerns. For example, the government considered purchasing aerial easements over the property, and limitations to restrict construction to public buildings.

There is insufficient evidence that the government dropped its acquisition efforts solely because BWPA stopped its efforts to develop. In contrast, the evidence supports the inference that the government dropped its efforts to acquire the property because it could not reach agreement with BWPA. GSA officials commented that BWPA's appraisal of the property was "inflated." P's ex. 49. Plaintiff's exhibit 200 shows that the government fully analyzed the negotiations, believed BWPA would demand more money than the government could afford, and dropped its efforts to acquire the property because it believed that it would be difficult for BWPA to overcome its water and sewer obstacles.

There is no evidence that the government offered BWPA

less than it knew the property was worth. The evidence shows, however, that government officials genuinely believed that the property was worth less than BWPA officials believed it was worth. As one official stated in 1969, "the owners...have advised that their property is worth about $20,000,000 to them. This figure is obviously far from the actual value of the property." P's ex. 49. The government's 1972 appraisal of the value of an aerial easement estimated the value at $350,000, and that is the amount that the government offered to purchase it. Similarly, during the 1987 negotiations for purchase, the government had authority to pay up to $9.7 million for the property, and it offered $9.2 million to BWPA.

Moreover, the government did not fail to act expeditiously to purchase the property. During the negotiations between 1968 and 1975, the government did not purchase the property because it could not reach agreement with BWPA. During 1985 through 1987, the government acted as quickly as it could given the cumbersome process of gaining funding authorization. There is little support for BWPA's repeated assertion that the government

had approval to purchase the property throughout the period in question.

BWPA also alleges that the government exercised enormous influence over the county approval process, influencing state and county officials to oppose the development. BWPA claims that the government notified the county that NSA planned to acquire part of the property, persuaded county employees to "drag their feet" in granting approvals, and practically dictated the highway designs so as to use traffic problems to prevent the development.

The court finds that the government did, in fact, notify the county that NSA intended to purchase 75 acres of the property. Further, the court finds that the government attempted to influence the decisions of county officials. NSA and Fort Meade officials attended county meetings concerning the development. They cultivated a relationship with Marion McCoy, a county zoning official. BWPA officials perceived that McCoy opposed the development, and they felt they had to guard against her influence. However, there is conflicting evidence of the overall effect of

NSA's influence on county officials. One document states that the county would "continue to process [the] subdivision until a *definite* commitment by Fort Meade has been made on [the] property." P's ex. 105 (emphasis in original). Another document suggests that county officials were "dragging their feet" about granting approvals in the hope that the government would acquire the tract. P's ex. 62. There was testimony that the approval process took an unusually long time for BWPA; while most sketch plans are approved within several months if there are no problems, approval for one of BWPA's sketch plans took over two years. Yet BWPA never failed to gain the approvals that it sought. Twice it received sketch plan approval. Once it received approval for an interim sewage treatment facility. Once it received a building permit. In light of the evidence, the court concludes that NSA attempted to influence the

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county approvals process through both public opposition and private persuasion. While the government's influence could have delayed some approvals, it never prevented them.

The court finds that the government's influence over the highway designs did not impede the development. The government intended to use traffic concerns as a reason for opposing the development. Plaintiff's exhibit 202 reflects that NSA officials recommended that "Fort Meade pursue a position that additional vehicular traffic resulting from occupants of developed enterprises on the Baltimore Washington Parkway property would add a problem which now exists on the Fort Meade/NSA/CSS's traffic capability." However, there is insufficient evidence that NSA influence over the traffic issues actually poisoned BWPA's development efforts. MDOT officials recognized that problems would ensue from the combination of traffic from NSA and Colony Fairfield. Maryland officials actively considered access to the property when they generated proposals for the Patuxent Freeway. Even if BWPA's access to Route 32 were closed, an alternative access route was available: extending Old Clark Road to Route 175. While BWPA opposed this alternative access, there is no evidence that the alternative

access would have prevented the development.[7]

Finally, BWPA claims that the government threatened to condemn the property. In December of 1985 NSA stated its intention to condemn the property and in June of 1986 it asked BWPA to delay its construction plans. The government followed both of these actions with the eminent domain proceedings filed in October 1987.

Legitimate government action which impairs the market value of real property ordinarily does not amount to a taking. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 15, 104 S.Ct. 2187, 2196, 81 L.Ed.2d 1 (1984). In *Kirby*, the Court did not find a taking when the government filed a notice of *lis pendens*, notifying the public that it had instituted condemnation proceedings, even though the notice reduced the market value of the property. *Id.* at 7, 104 S.Ct. at 2192. Observing that filing a notice of *lis pendens* was a legitimate governmental action that

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[7]Plaintiff's traffic expert, William Baumgaertner, relied on these and other documents to conclude that the government's activity on the traffic issues impeded development. The court has reviewed the documents that Baumgaertner relied on and reaches different conclusions for the reasons stated.

did not "interfere[ ] with an owner's legal right to dispose of his land," the Court reasoned that "[u]ntil title passed to the United States, [the landowner] was free to make whatever use it pleased of its property." *Id.* at 15, 104 S.Ct. at 2196. In accordance with this principle, courts have held that a threat of condemnation by the United States was not a taking even if it tended to thwart a proposed development. *Mesa Ranch Partnership*, 2 Cl.Ct. at 707. Nor was it a taking if the United States cut off the best highway access from a property, so long as other access routes were available. *Id.* at 709. In *De-Tom Enters., Inc. v. United States*, 213 Ct.Cl. 362, 552 F.2d 337 (1977), the fact that government officials spoke at a public hearing against a proposed zoning change on a piece of private property did not support a taking claim. The court analogized the government to a powerful adjoining landowner, such as "a large private manufacturer or comparable enterprise, or an organized group of citizens." 213 Ct.Cl. at 365, 552 F.2d 337.

At the other extreme, government conduct which goes beyond legitimate government action and interferes with the legal

rights of landowners may constitute a taking. *Althaus v. United States*, 7 Cl.Ct. 688, 694 (1985). In *Althaus*, the court found a taking because the government substantially eliminated all markets and uses for a parcel of land, and then purposefully offered to purchase the land for a fraction of its value. Similarly, government conduct amounted to a taking when the government completely and purposefully deprived a landowner of all highway access to his property, thereby preventing

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any chance for it to develop the property. *Drakes Bay Land Co. v. United States*, 191 Ct.Cl. 389, 401, 411, 424 F.2d 574 (1970).

Many of the government's actions in this case fall under the category of legitimate government actions that normally do not constitute a taking. First, the government negotiated in good faith, but unsuccessfully, to purchase the property. Good faith negotiations to purchase the property do not constitute a taking. *Mesa Ranch Partnership*, 2 Cl.Ct. at 708. Second the government opposed development during county meetings. Speaking against the development at public meetings and contacting public officials

are typical actions of concerned neighbors who oppose development and do not constitute a taking. *De-Tom Enters.*, 213 Cl.Ct. at 365, 552 F.2d 337. Third, the government informed county officials of NSA's intent to purchase the property. The government may state its intention to condemn property without effecting a taking. *Mesa Ranch*, 2 Cl.Ct. at 707. Fourth, the government took almost two years to secure funding approvals to purchase the property. Here, as in *Kirby*, the government's stated intention to acquire the land may have had the effect of reducing the market value for the property. Nevertheless, BWPA remained free to make whatever use of the property it pleased until title passed to the United States. Finally, the government did not take the property until its development was imminent. The government, however, had no obligation to purchase the property until it agreed to do so. Moreover, government officials genuinely doubted the plaintiff's ability to develop the property and thus had no reason to acquire it until development became imminent.

Some of the government's actions may not fall under the rubric of legitimate actions. Government officials wielded

substantial influence over the state highway planning decisions and intended at one point to use highway issues to persuade county officials to reject development. Government officials also cultivated a relationship with one county zoning official in order to enlist her support against the development. Assuming, *arguendo*, these actions impaired BWPA's ability to develop its property, they could support a taking claim. The court will next examine the extent to which these governmental actions interfered with BWPA's reasonable investment-backed expectations.

*Interference With Reasonable Investment-Backed Expectations*

First, the court must determine whether the plaintiff's expectations for development were reasonable. The court finds that though BWPA's hopes for developing the property were reasonable to some extent, there were no guarantees that it would have been able to achieve full development within a reasonable time period. BWPA's hired consultants concluded that building water and sewer service were feasible but would have taken several years. Further testimony showed that developers of the KMS building, which was completed in 1990 on property close to the

BWPA tract, had difficulty finding tenants. That example suggests that there was no guarantee of successful development. Thus, the court concludes that BWPA's investment-backed expectations were reasonably possible but not certain to be fulfilled.

Next, the court must determine whether the government's actions actually prevented BWPA from developing the property. Most of the government's actions did not impede development; rather, BWPA officials chose not to pursue development aggressively. First , there is no support for BWPA's contention that the government negotiated in bad faith merely to induce BWPA to stop its development. The court has found previously that the government did not negotiate in bad faith. Second, if BWPA ceased its development efforts because it hoped the government would acquire the property, that was BWPA's choice. Third, there is insufficient evidence that alleged threats to condemn the property actually prevented the development. Though Dennis Berman testified that it is difficult to obtain financing or sell the property under a threat to condemn, the record contains no evidence that BWPA

was rejected for a loan due to government threats nor that potential buyers declined to buy it because of government threats. Moreover, Berman admitted that BWPA could have built pieces of the development without outside financing. Fourth, BWPA lacks evidence that the government's influence over any of the traffic-related issues actually impeded the development. Though NSA wanted to close one access route to the property, another access route was available. There is no taking so long as some access route was available. *Mesa Ranch Partnership*, 2 Cl.Ct. at 709. In addition, the county authorities approved BWPA's sketch plans, and BWPA obtained a building permit. The court finds little evidence that the government's plans to build the connector road impaired BWPA's development efforts.

Finally, there is insufficient evidence that the government's opposition to the development during the county approvals process actually impeded the development. NSA may have used its relationship with Marion McCoy to slow down the county zoning approvals. However, the evidence is inconclusive as to whether

the government's influence caused a delay. While testimony indicated that one of BWPA's sketch plan approvals took longer than usual, BWPA twice won sketch plan approval, once gained approval for an interim sewage treatment plant and obtained a building permit. Thus, BWPA has not established by a preponderance of the evidence that the government substantially interfered with the approvals process for the development.

BWPA argues that the totality of the government's actions made it risky for BWPA to prepare its property for development because BWPA knew it could not recover preparation costs from the government through an eminent domain proceeding. Thus, according to BWPA, it risked losing money if it started to develop and the property was taken; yet if BWPA did not develop the property, the government would not have taken it.

This argument assumes, without support, that the government's taking was inevitable. The court is not persuaded that the taking was a foregone conclusion. At least once previously, the government failed to gain funding approval to purchase a limited interest in the property. Also previously, the

government had attempted to purchase limited interests in the property, leaving some portions available for development. NSA officials also desired to acquire the entire property. However, the record fails to support the inference that at all times NSA officials could gain approval for the purchase. Moreover, this fact tends to undermine BWPA's position, because it suggests that BWPA controlled whether the property would have been taken or developed. In *Kirby Forest*, the Court observed that

> any effort by petitioner to develop the land probably would have prompted the Government to ...to file a declaration of taking ...But the likelihood that the United States would have responded in that fashion ...weakens rather than strengthens petitioner's position, because it suggests that petitioner had the option, at any time, to precipitate an immediate taking of the land.

467 U.S. at 15-16, 104 S.Ct. at 2196-97. The same analysis applies here. If BWPA had begun construction, the government would have attempted to secure funding to acquire the land. If the

government failed to acquire the land, then BWPA would have completed its development. In fact, it was BWPA's letter to NSA indicating that development was imminent that precipitated the government's efforts in 1985 to obtain funding to take the property.

*The Economic Impact of the Government's Action*

Because the court finds that the government's actions did not actually interfere with the development, it also concludes that the government's actions had little economic impact on BWPA. Several factors buttress this conclusion. The government offered the plaintiff several opportunities to avoid a taking by selling its land or interests in the land. This distinguishes this case from *Drakes Bay*. In *Drakes*

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*Bay*, the court held that the government completely precluded development when it acquired the only piece of land that could connect the subject property to highways. Once it acquired this land, the government refused to permit road construction and refused to purchase the subject property. 191 Ct.Cl. at 411, 424

F.2d 574. Here, by contrast, the government never could have stopped the development completely. By its own admission, BWPA made business decisions to stop its development efforts when it believed the government would acquire the land. BWPA could at all times have precipitated a taking, or achieved development if it had continued its efforts to do so.

The case also differs from *Althaus*. In *Althaus*, the government deliberately offered less than it knew the land was worth, and created an environment wherein landowners could neither sell nor use their property. 7 Cl.Ct. at 694-95. Here, however, evidence shows that the government offered close to the value of appraisals performed by independent consultants. Moreover, BWPA remained free to attempt to develop its land if it wished. Thus, BWPA was not deprived of a market for its property. Courts have stressed that there is no taking if the plaintiff remained free to sell the property or to develop the property to some extent. *Mesa Ranch*, 2 Cl.Ct. at 709; *De-Tom Enters.*, 213 Ct.Cl. at 370, 552 F.2d 337.

Thus, BWPA has not established by a preponderance of the

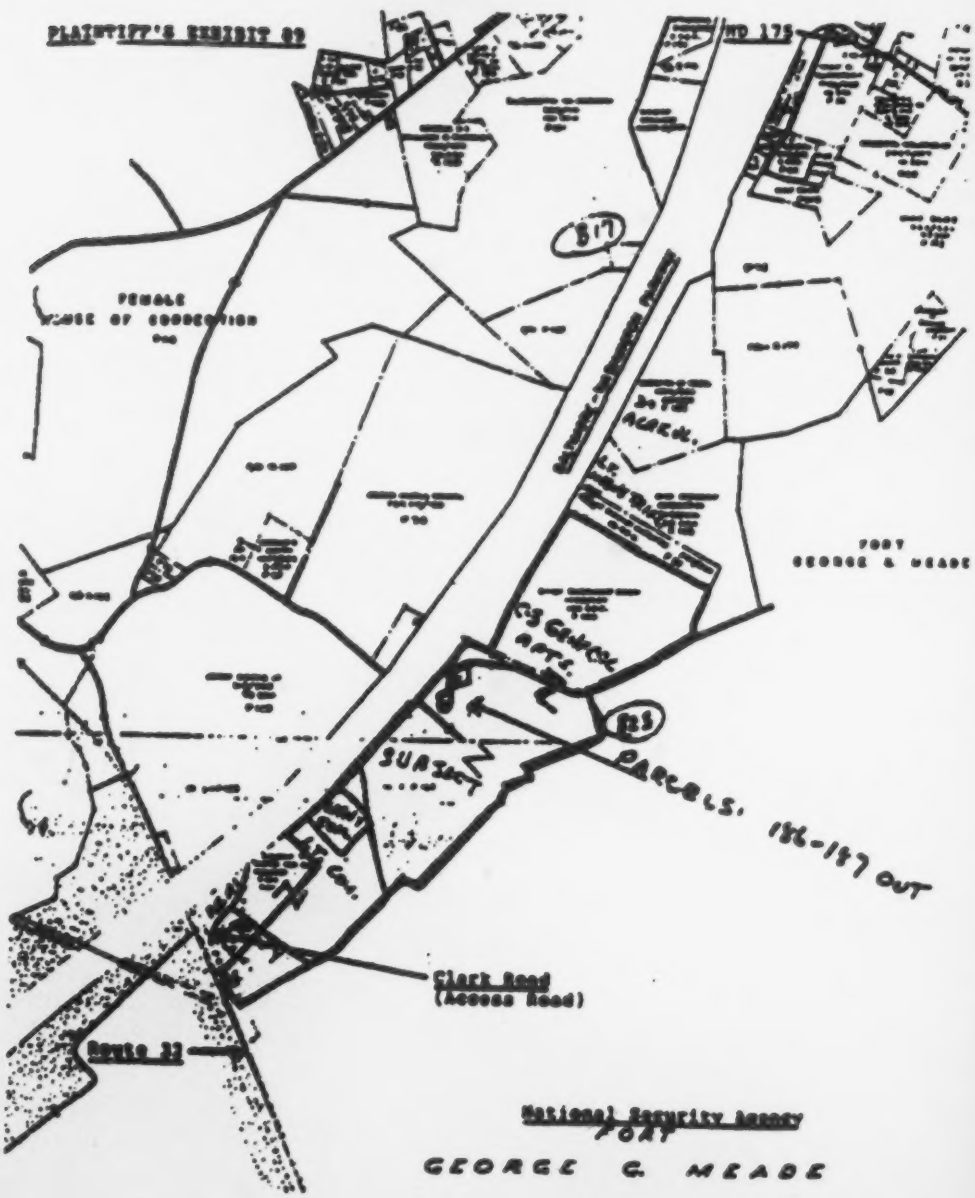
evidence that the government's conduct caused BWPA to fail to develop its property and suffer economic loss as a result.

## CONCLUSION

After a thorough review of the evidence presented at trial and the entire record, the court concludes that plaintiff has not established a taking by a preponderance of the evidence. Accordingly, the court finds for the defendant. The Clerk is directed to enter judgment for the defendant and dismiss plaintiff's complaint. No costs.

APPENDIX

PLAINTIFF'S EXHIBIT 89



# APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-5038

BW PARKWAY ASSOCIATES LIMITED PARTNERSHIP

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 539-89L

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED: AFFIRMED.

Per Curiam (PLAGER, LOURIE, and RADER, Circuit Judges). See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED SEP 15 1994

/s/
Francis X. Gindhart, Clerk

Costs: AGAINST APPELLANT

PRINTING ————$77.25

TOTAL————$77.25

ISSUED AS A MANDATE: OCT 6 1994

FILED

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SEP 15 1994

FRANCIS X. GINDHART

CLERK

# APPENDIX C

U.S. CONST. amend. IV:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V:

> "No person shall beheld to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

# APPENDIX D

**10 U.S.C. § 2803 Emergency Construction**

(a) Subject to subsections (b) and (c), the Secretary concerned may carry out a military construction project not other authorized by law if the Secretary determines (1) that the project is vital to the national security, and (2) that the requirement for the project is so urgent that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security.

**10 U.S.C. § 2672(a) Emergency Construction**

The Secretary of a military department may acquire any interest in land that -

(1) he or his designee determines is needed in the interest of national defense;

(2) is required to maintain the operation integrity of a military installation; and

(3) considerations of urgency do not permit the delay necessary to include the required acquisition in an annual Military Construction Authorization Act.

Appropriations available for military construction may be used for the purposes of this section. The authority to acquire an interest in land under this section includes authority to make surveys and acquire interests in land (including temporary use), by gift, purchase, exchange of land owned by the United States, or otherwise. The Secretary of a military department contemplating action under this provision will provide notice, in writing, to the Armed Services Committees of the Senate and House of Representatives at least 30 days in advance of any action being taken.

**42 U.S.C. § 4651 Uniform policy on real property acquisition practices**

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following

policies:

(1) the head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(7) in no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) if any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.